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No. 97-215

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

THOMAS M. THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals retains jurisdiction to recall its mandate and grant *en banc* review of a decision of a three-judge panel of its court notwithstanding (a) the law of the case doctrine, (b) this Court's denial of certiorari to the original panel decision or (c) the preclusive successive writ provisions of the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. §2244(b))

2. Whether the Court of Appeals abused its discretion in granting *en banc* review and recalling its mandate where it concluded that the original three-judge panel decision was an erroneous ruling which worked substantial injustice and where an earlier vote on *en banc* review had not been taken because of the court's own administrative error.

3. Whether the Court of Appeals, sitting *en banc*, erred in concluding that the three-judge panel "committed fundamental errors of law that would result in manifest injustice" sufficient to justify recalling the mandate where the *en banc* court found that, but for the ineffective assistance of counsel received by respondent at trial, he would not have been found guilty of the sole predicate offense that made him death-eligible under California law.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the Nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . and Promote the proper and fair administration of justice." NACDL has 9,000 members nationwide — along with 78 state and local affiliate organizations numbering 25,000 members — including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*. *See, e.g., Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996); *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996).[1]

This case poses important questions of great concern to *amicus curiae*: whether the federal courts of appeals exercising jurisdiction over habeas corpus appeals filed by death-sentenced state prisoners may recall their mandate and grant *en banc* review where the *en banc* court concludes that

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[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

the three-judge panel that initially heard the appeal has committed a fundamental error of law resulting in manifest injustice. This question is particularly compelling in this case, where the *en banc* court concluded on the merits that the errors and omissions of defense counsel at respondent's state trial directly contributed to his client's conviction of the predicate offense that was the sole special circumstance making him death-eligible under California law.

As an organization of criminal defense attorneys who regularly litigate throughout the state and federal courts of this nation, NACDL brings to the Court a significant perspective on the unique role of counsel in providing effective representation in capital cases as well as on the role of the federal courts exercising their habeas jurisdiction in the review of state criminal trials and appeals.

SUMMARY OF ARGUMENT

1. The court of appeals acted well within its jurisdiction in granting *en banc* review to recall its mandate in this capital habeas appeal. Notwithstanding this Court's denial of certiorari to the original panel decision, which reversed the district court's grant of the writ on grounds of ineffective assistance of counsel, the *en banc* court was within its authority in promptly recalling its mandate on grounds of manifest injustice and thereafter granting merits review, reversing the original panel and granting partial habeas relief. The law of case doctrine does not prevent an *en banc* court from reviewing a decision of one of its panels. Nor does rehearing *en banc* the identical issues previously considered by the panel implicate the successive writ provisions of the newly-enacted AEDPA.

2. The court of appeals properly exercised its discretion in convening *en banc* to consider recalling its mandate and according merits review to relator's ineffective assistance of counsel claims. Where it was the court's own administrative error that was responsible for its failure to take a timely poll of the nonrecused, active judges of the full court during the regular rehearing process, the court properly exercised its discretion in according relator the belated *en banc* consideration that his claims ultimately warranted.

ARGUMENT

I. THE COURT OF APPEALS ACTED WITHIN ITS JURISDICTION IN GRANTING *EN BANC* REVIEW TO RECALL ITS MANDATE IN THIS CAPITAL HABEAS APPEAL NOTWITHSTANDING THE DENIAL OF CERTIORARI, THE LAW OF THE CASE DOCTRINE OR THE PRECLUSIVE SUCCESSIVE WRIT PROVISIONS OF THE AEDPA

In weighing the often competing interests of federalism and finality with those of fundamental fairness in considering the constitutional claims of a death-sentenced state prisoner, the Court of Appeals for the Ninth Circuit held the balance true. It properly determined on the merits that Thomas Thompson had received ineffective assistance of counsel at his state murder trial and that he was tangibly prejudiced insofar as his attorney's errors and omissions blotted out his colorable claim of innocence of the rape charge that was the sole predicate making him death-eligible under California law.

While the State, not surprisingly, disputes the court of appeals' resolution of the merits, it saves its principal fire for the manner in which the full court granted *en banc* review and resumed jurisdiction over the appeal — in effect, rehearing *de novo* the original three-judge panel's decision which reversed the district court's grant of habeas corpus relief. *See Thompson v. Calderon*, 109 F.3d 1358 (9th Cir. 1997).

The court of appeals, however, acted well within its authority in reasserting jurisdiction over the appeal. Pursuant to a vote of the full court, it convened *en banc* to decide whether to recall the mandate to consider whether the original panel's decision would result in a fundamental miscarriage of justice. *Thompson v. Calderon*, 120 F.3d 1042, 1043 (9th Cir. July 30, 1997). After hearing argument on August 1, 1997, the *en banc* court recalled the mandate and reviewed Thompson's ineffective assistance of counsel claim on the merits. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. August 3, 1997). As the *en banc* court explained in some detail (120 F.3d at 1047-51), a timely vote on *en banc* review mistakenly had not been taken during the earlier rehearing period because of inadvertent administrative errors committed within the court itself.

Accordingly, notwithstanding this Court's denial of certiorari to the original panel decision, neither the law of the case doctrine, principles of finality and *res judicata* nor the preclusive successive writ provisions of the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214, codified at 28 U.S.C. §2244(b), effective April 24, 1996, prevented the *en banc* court of appeals from recalling its mandate, properly hearing the case on the merits and according it expedited merits consideration under the principles of *Barefoot v. Estelle*, 463 U.S. 880 (1983) and successor cases.

A. The *En Banc* Court of Appeals Acted Well Within Its Authority In Recalling its Mandate Within Sixty Days of its Issuance

While the original panel denied Thompson's emergency motion seeking recall of the mandate and reconsideration of the merits, the court of appeals was well within its authority in convening *en banc* to consider recall of the mandate. *See Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 272 (1953) (Frankfurter, J., concurring)("It may be proper to require petitions for rehearing en banc to be made to the panel in the first instance, but to allow the discretionary function under [28 U.S.C.] §46(c) to be discharged definitively by the panel whose judgment may call for en banc action is to treat the statute as an empty, purposeless form of words.")

The power of the court of appeals to recall its mandate has long been recognized. 28 U.S.C. §2106 expressly authorizes an appellate court to affirm, modify or vacate any judgment or order of a court brought before it for review, and to enter such judgment or require such further proceedings "as may be just under the circumstances". *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971)(applying §2106); *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 592, 593-94 (3d Cir. 1977)(applying §2106 to appellate court's reconsideration of its own decisions, not merely review of lower court rulings). As Judge Leventhal characterized the court's power in this regard, "[t]he recall of an appellate mandate to avoid injustice is a continuation, in the appellate sphere, of a deeply rooted equity jurisprudence." *Greater Boston*, 463 F.2d at 279. *See* 16 Charles A. Wright, Arthur Miller, Edward Cooper,

Federal Practice and Procedure §3938 (2d ed. 1996)(and authorities collected therein).[2]

While the recall power is undisputed, it is utilized sparingly, in deference to interests of repose and finality in litigation. Accordingly, whether characterized in terms of "good cause", "special circumstances" or "preventing injustice", the critical determination is whether the litigant has demonstrated some reason sufficiently compelling to overcome the policy of finality. *Zipfel*, 861 F.2d at 567-68 ("an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate to prevent an injustice"); *Greater Boston*, 463 F.2d at 277-78 ("good cause", "exceptional circumstances", "preventing injustice"); *see also Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir. 1996); *cf. Adamson v. Lewis*, 955 F.2d 614, 618-20 (9th Cir. 1992).[3]

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[2] Even courts disclaiming reliance on statutory authority nonetheless agree on the courts' recall power, finding it rooted simply in its "inherent power" over its own jurisdiction as well as its supervisory "power to protect the integrity of its own processes." *See, e.g., Patterson v. Crabb*, 904 F.2d 1179, 1180 (7th Cir. 1990); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *A to Z Portion Meats, Inc. v. N.L.R.B.*, 643 F.2d 390, 391 n.1 (6th Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). Certainly, there can be little dispute that mandate stays and recalls are sufficiently necessary incidents of appellate jurisdiction and authority to rehear appeals *en banc*, pursuant to 28 U.S.C. §46(c), F.R.A.P. Rule 35 and *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941), to fall within the appellate court's inherent powers.

[3] The Third Circuit suggests an additional factor — whether recall would be in the public interest — finding that this consideration also applies under the rubric of "good cause" or "special circumstances". *American Iron and Steel Institute*, 560 F.2d at 598.

Here, the *en banc* court relied upon two compelling considerations. First, the court's normal *en banc* procedure did not function in its customary manner so as to allow all the active judges in this geographically far-flung circuit to properly participate. Because of a procedural misunderstanding within the court — for which the litigants bore no responsibility — a request for an *en banc* poll within the circuit was not made and voted upon at the appropriate time. *Cf. Amadeo v. Zant*, 486 U.S. 214, 222 (1988)(litigant not penalized by forfeiture of claim where failure to address it was due to an impediment external to the parties). Second, the *en banc* court concluded on the merits that in reversing the district court, the original panel made a fundamental error of law that, if not corrected, would lead to a miscarriage of justice — *i.e.*, the execution of a person who might well be innocent of the sole death-qualifying circumstance found against him. 120 F.3d at 1048.

Under analogous circumstances, this Court itself has recognized that, notwithstanding its "deep rooted policy in favor of the repose of judgments", the ordinary principles of finality must yield to the overriding interest of "correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term [of court] rule", where enforcement of the judgment is "manifestly unconscionable". *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944), *as quoted in Greater Boston*, 463 F.2d at 278. Indeed, on several occasions, it has acted *sua sponte* to vacate denials of certiorari or rehearing and has recalled its original mandate as "erroneous", finding that under the *sui generis* circumstances of the particular case that "the interests of finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957). *See also Gondeck v.*

Pan American World Airways, Inc., 382 U.S. 25, 26-27 (1965)(accord); *Cahill v. New York, New Haven & Hudson RR.*, 351 U.S. 183 (1956)(original mandate recalled as "erroneous").

B. The Court of Appeals Acted Appropriately Within Its Authority In Convening *En Banc* To Consider Recalling The Mandate And Thereafter Granting Merits Review

Pursuant to the vote taken by the majority of its active judges, the court of appeals convened *en banc* to consider recall of the mandate, which it addressed in tandem with the merits of Thompson's constitutional claims. This expedited procedure was perfectly proper. A court of appeals is entitled both to reconsider a prior decision *sua sponte*, *see, e.g., United States v. Melendez*, 60 F.3d 41, 44 (2d Cir. 1995), *vacated in part on other grounds*, 116 S.Ct. 900 (1996), and to order a rehearing *sua sponte, see, e.g., Krimmell v. Hopkins*, 56 F.3d 873, 874 (8th Cir. 1995). *See Triestman v. United States*, ___ F.3d ___, 1997 WL 529622, at *5 (2d Cir. 1997)(Calabresi, J.)(even the restrictive new filing rules and appellate review provisions for successive petitions under AEDPA "do[] not purport to limit the court's own power to review its decisions or to undertake a rehearing. * * * [A] court of appeals retains the authority to order a rehearing *sua sponte*."); *cf. Hazel-Atlas Glass Co.*, 322 U.S. at 246 ("Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants"). Indeed, the court of appeals may rehear a case *en banc* notwithstanding the absence of any motion for rehearing. *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979).

In *Western Pacific Railroad Corp.*, 345 U.S. at 250, 257-60, this Court reaffirmed that while the Judicial Code

provides that cases ordinarily "shall be heard and determined by a court or panel of not more than three judges * * * " (28 U.S.C. §46(c)), the statute constituted a broad grant of power to each court of appeals to hold *en banc* hearings, vesting wide discretion in each court to decide for itself just how and when that power shall be exercised. *See also Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 4-5 (1963).[4]

Accordingly, courts of appeals have almost unfettered discretion to hear cases *en banc* virtually everywhere throughout the appellate pipeline — *i.e.*, appeals may be taken *en banc* from the very outset (*e.g., United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976)) or even on pretrial interlocutory review heard concurrently during the pendency

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[4] Clearly, a decision by all the active judges of a federal circuit to grant *en banc* review is made entirely independent of — and is not bound by the same policy or time-constraints as — a request for ordinary panel rehearing. As this Court noted in *Missouri v. Jenkins*, 495 U.S. 33, 45-48 (1990), the difference between an F.R.A.P. Rule 40(a) petition for panel rehearing and a Rule 35(a) suggestion for rehearing *en banc* is important with respect to this Court's certiorari jurisdiction. A timely petition for panel rehearing suspends the ninety day period for seeking certiorari. A suggestion for rehearing *en banc* does not toll the time. *Jenkins*, 495 U.S. at 45-48 & nn.14 & 17.

The disparate impact on this Court's certiorari practice clearly reflects the different purposes of the two rehearing devices. Rehearing *en banc* is used by the full court to address questions of exceptional importance or to maintain uniformity of the law within the circuit. *See* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 813-28 (1993); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1011-13, 1022-23, 1032-38 (1991); Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29, 41-54 (1988).

of the underlying trial in the district court (*United States v. Monsanto*, 491 U.S. 600, 605-06 & n.5 (1989)).

Nor are the two illustrative grounds formally set forth in F.R.A.P. Rule 35(a) for convening the court *en banc* — (1) securing or maintaining uniformity of decisions, or (2) questions of exceptional importance — exclusive or self-defining terms. Two commentators, one of whom is a federal appellate judge, construe these criteria flexibly (59 Geo. Wash. L. Rev. at 1022-23):

> However one may try to express them as criteria, in practice there are three good reasons to rehear a case en banc. First, rehearing en banc allows the full court to maintain consistency in the case law — intracircuit, intercircuit or between the circuit and the Supreme Court. Second, the full court may wish to address an issue of great importance. Third, the full court can correct an apparently erroneous result — either of the panel's own or arising from an earlier panel's decision that bound the panel whose decision is reheard.[5]

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[5] Justice Frankfurter similarly characterized the circumstances under which *en banc* review would be advisable (*Western Pacific*, 345 U.S. at 270-71):

> [D]eterminations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear the case or which has heard it. Hearings en banc may be a resort also in cases extraordinary in scale — either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit.

In this respect, the three-judge panel that ordinarily sits in the court of appeals may be viewed as the agent for the full court, deputed to hear and determine cases in conformity with the law as the full court views it. Thus, majority control of circuit law through the *en banc* process "enable[s] the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control . . . its decisions." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90 (1960), *quoting* Albert Maris, *Hearing and Rehearing Cases En Banc*, 14 F.R.D. 91, 96 (1953); Ginsburg & Falk, 59 Geo. Wash. L. Rev. at 1035 ("we have more confidence in the result to which a greater, rather than a lesser, number of judges subscribe[]"); Stein, 54 U. Pitt. L. Rev. at 821 ("the overwhelming importance of uniformity to circuit law outweighs the institutional costs incurred by en banc rehearings"); *see also id.* at 822-29.

Viewed in this perspective, the decision by the majority of the active judges of a circuit to review a panel decision is an exercise in judicial authority that is not lightly undertaken (59 Geo. Wash. L. Rev. at 1038):

> [I]t is more useful to think of the majority's decision to rehear a case en banc as analogous to the decision of a minority of four Supreme Court Justices to grant a writ of certiorari. If four Justices believe that a court of appeals decision is or may be in error, or that it would be desirable for the Court to make a definitive statement of the law in a particular area, that is reason enough for all nine Justices to hear the case. Surely, on the Court of Appeals, if seven or more of the twelve believe that a panel probably erred (or was bound by a precedent that should be reexamined), that is a good enough reason for review by the full Court.

Moreover, the *en banc* court's consideration of the merits in tandem with recall of the mandate was a necessary incident of its review function. As the court itself explained (120 F.3d at 1051), any consideration of "manifest injustice" inevitably requires analysis of the merits of the litigant's underlying claim. Accordingly, not unlike the retroactivity analysis called for by *Teague v. Lane*, 489 U.S. 288 (1989), preliminary consideration of the merits inevitably blends with the determination of manifest injustice — *i.e.*, the litigant suffers no injustice if the underlying claim is nonmeritorious. Thus, when it voted to recall the mandate, the *en banc* court did so on the basis of substantial familiarity with the merits of Thompson's claims. This was perfectly in keeping with this Court's frequent admonitions that, whenever practicable, appellate consideration of capital-case stay requests should be combined with merits review. *Cf. Barefoot v. Estelle*, 463 U.S. at 894-95.

C. The Law Of The Case Doctrine Does Not Preclude The *En Banc* Court Of Appeals From Reviewing A Decision By One Of Its Three-Judge Panels

The State wholly misconceives the law of the case doctrine when it suggests that after the denial of certiorari and issuance of the appellate mandate, the *en banc* court of appeals lacks authority either to recall the mandate or to grant belated *en banc* review.

First, while loath to reconsider questions once decided in the same proceeding, courts nonetheless retain the power to reconsider if they wish. *See* Justice Holmes' classic statement, *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)(the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.") *See also* 18 C. Wright, A. Miller, E. Cooper, *supra*, §4478 (1981)(collecting authorities); 1B James Wm. Moore, *Moore's Federal Practice* ¶0.404 (2d ed. 1993 rev.)(collecting authorities).

The correct statement of the law, which this Court has twice cited as authoritative, is set forth in *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). *See Arizona v. California*, 460 U.S. 616, 618 n.8 (1983)("Under the law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. *See, e.g., White v. Murtha*. . ."); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988)("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstances, although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was erroneous and would work a manifest injustice.") *See also Moore's Federal Practice* ¶0.404[4.-6] at II-35 - II-36 n.42 (collecting multiple circuits' reliance on *Murtha* test). Here, of course, the *en banc* court relied on the "manifest injustice" test in overturning the original panel's decision, which itself had overturned the district court's grant of habeas relief, after an extensive evidentiary hearing.

More to the point, however, the law of the case doctrine has no application here, where the court of appeals is sitting *en banc* to review the very decision the State asserts is dispositive. However binding a three-judge panel's decision may be on subsequent panels in the same circuit, that decision is hardly dispositive for the court of appeals that has convened *en banc* specially to review it. The Second Circuit has said it best (*Van Gemert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978), *aff'd*, 444 U.S. 913 (1980)):

> [S]itting en banc, we may overrule any panel decision that a majority of the active judges believe was wrongly decided, unless a party would be seriously prejudiced as a result. * * * The [law of the case] doctrine * * * is properly applied to the district court and to other panels of the Court of Appeals. It cannot immunize panel decisions from review by the court en banc.[6]

Nor does this Court's denial of certiorari to the panel decision immunize it from further review by the full court of appeals. The denial of certiorari may serve as an end-point to litigation by leaving the court of appeals' prior mandate intact — a mandate which, of course, the *en banc* court of appeals retains the power to recall. Otherwise, however, the denial of certiorari has no precedential impact on the litigation which either binds the court of appeals or precludes it from acting in its own behalf.[7]

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[6] *See also Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997)(*en banc*)("law of the case is not binding on an en banc court"); *Watkins v. United States Army*, 875 F.2d 699, 704 n.8 (9th Cir. 1989)(*en banc*); *Shimman v. Intl. Union of Oper. Engrs., Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984)("The law of the case doctrine * * * does not impair the power of an en banc court to overrule any panel decision."); *In re Central R.R. of New Jersey*, 485 F.2d 208, 210-11 (3d Cir. 1973).

[7] It hardly needs reiteration that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923)(Holmes, J., for a unanimous Court); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950)(Frankfurter, J., respecting the denial of certiorari); *Brown v. Allen*, 344 U.S. 443, 492 (1952) (Frankfurter, J., for the Court); Peter Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1251-53 (1979).

Clearly, adjudication aims at a correct decision and if the court of appeals is convinced that the original panel decision was palpably wrong, as it was in this case, the law of the case doctrine does not preclude correction of plain error or manifest injustice. *See, e.g., Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082 (D.C. Cir. 1984).

D. The *En Banc* Court's Recall Of Its Mandate To Rehear The Same Issues Previously Considered By The Original Three-Judge Panel Does Not Implicate The Successive Writ Provisions Of The AEDPA

As the *en banc* court noted explicitly, it granted review of the original panel decision in this case without regard to any new arguments, evidence or grounds for relief other than those previously pressed before the district court (which granted partial habeas relief) or the original appellate panel (which reversed it). Accordingly, the *en banc* court acted strictly on the basis of the original record from the district court as well as its *sua sponte* conclusion that the interests of justice required it to accord Thompson the *en banc* review he should have received in the immediate wake of the panel's decision.[8]

Accordingly, where the *en banc* court considered no evidence or arguments not before the original panel, the State's suggestion that *en banc* review is some sort of end-run around the newly-enacted (and harshly preclusive) successive

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[8] While Thompson had filed a Rule 60(b) motion in the district court, alleging newly-discovered evidence, that motion was denied in the district court and the court of appeals dismissed the appeal in a separate order. *Thompson III*, 120 F.3d at 1048 n.1. Thus, the only proceeding pending before the *en banc* court was the rehearing of the original appeal. *Id.*, 120 F.3d at 1049.

writ provisions of the AEDPA — 28 U.S.C. §2244(b) — is utterly without merit.[9]

Indeed, the *en banc* court acted well within its habeas jurisdiction. It openly acknowledged that it may not use its recall power "'simply as a device for granting late rehearing'", citing several of its own decisions in which it had denied similar relief, *see, e.g., Moran v. McDaniel*, 80 F.3d 1261, 1267 (9th Cir. 1996) (*quoting Johnson v. Bechtel Assocs.*, 801 F.2d 412, 416 (D.C. Cir. 1986)). *See also Nevius v. Sumner*, 105 F.3d at 460-61; *Williams v. Calderon*, 83 F. 3d 281 (9th Cir. 1996).

Nor was the mandate recalled in order to allow consideration of new grounds or contentions not raised in the original habeas proceeding. *Ruiz v. Norris*, 104 F.3d 163, 164-65 (8th Cir. 1997). Obviously, the belated injection of new evidence, claims or contentions into the earlier habeas proceeding would have been the functional equivalent of a second or successive petition, which would have to meet the exacting standards now required of such petitions. *Id.* at 164. In that event, of course, the new provisions of the AEDPA would apply. Here, in contrast, the *en banc* court went to great pains to emphasize that it was considering only the same arguments and contentions previously raised before the original panel. *Thompson III*, 120 F.3d at 1049.

Accordingly, just as the original panel decision is not the law of the case once the *en banc* court convened to review it,

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[9] The successive writ provisions of the newly-enacted AEDPA apply prospectively to state prisoners who file new writs after the statute's enactment date — April 24, 1996. *See Lindh v. Murphy*, 117 S.Ct. 2059 (1997). Thompson, of course, filed his federal writ in the district court in 1990 and the *en banc* court granted belated review of that first writ in the summer of 1997.

so, too, it is with the *en banc* court's decision to review the original panel decision. It constituted merely a resumption of the original hierarchical review that was short-circuited by the administrative error of the court itself during Thompson's original passage through the court of appeals earlier in the year. In that respect, it was little different from the belated recall of the mandate issued by judicial error in *Patterson v. Crabb*, 904 F. 2d at 1180, where the Seventh Circuit gave the litigant the one full hearing on appeal which, through judicial error, he had been inadvertently denied.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN GRANTING *EN BANC* REVIEW, RECALLING ITS MANDATE AND CONDUCTING EXPEDITED MERITS REVIEW WHERE THE COURT'S OWN ADMINISTRATIVE ERROR WAS RESPONSIBLE FOR DELAYING AN EARLIER *EN BANC* VOTE

Given the expedited time-frame in which this case was heard and disposed of on the merits, the court of appeals acted well within its discretion in granting *en banc* review, recalling its mandate and conducting expedited merits review. That its belated *en banc* grant was caused by the court's own administrative error in failing to conduct an earlier *en banc* poll was certainly well within the court's discretion to remedy.

A brief recapitulation of the later stages of this litigation is necessary to place the court's expedited procedures in context. With his execution scheduled for August 5, 1997, Thompson filed an emergency motion with the court of appeals requesting that the panel recall its mandate and reconsider its earlier decision on July 22, 1997. The panel denied the motion. *Thompson III*, 120 F.3d at 1047-48.

However, on July 30, 1997, a majority of the nonrecused, active judges of the circuit voted to reconsider *en banc* whether to recall the mandate. *Thompson II*, 120 F.3d at 1043. Oral argument — devoted both to the recall question as well as the underlying merits — was heard by the *en banc* court on August 1, 1997. On August 3, 1997, the *en banc* court rendered its decision. By a vote of seven to four, it recalled the mandate, reversed the original panel opinion and affirmed the district court's grant of partial habeas relief. *Thompson III*, 120 F.3d at 1048. Thus, expedited *en banc* proceedings were conducted — and concluded — within five days of the full court's decision to accord the case *en banc* review.

A. The *En Banc* Court Of Appeals Properly Conducted Expedited Merits Review In Tandem With Recall Of The Mandate

In *Barefoot v. Estelle*, 463 U.S. at 894-95, this Court suggested that the courts of appeals adopt expedited procedures to resolve the merits of habeas appeals heard in connection with applications for stays of execution of death sentences, "unless exigencies of time preclude a considered decision on the merits, in which case the motion for a stay must be granted." *Id.* At 894.

Here, of course, the *en banc* court provided just such expedited consideration, resolving the recall question — as well as merits review — within five days after *en banc* review

was granted by the full court.[10] Since the *en banc* court was required to determine whether failure to recall the mandate would result in a "manifest injustice", it was obviously required to address the merits of Thompson's underlying ineffective assistance of counsel claims. Thus, the decision on recall of the mandate was so closely intertwined with the merits of Thompson's claim that the *en banc* court acted quite expeditiously in resolving both issues in tandem without unnecessary delay.

B. The Full Court's *Sua Sponte* Correction Of Its Own Administrative Error In Failing To Conduct An Earlier *En Banc* Poll Was Properly Within The Court's Discretion

As this Court noted in *Western Pacific*, 345 U.S. at 250, 267-70, the courts of appeals are accorded unusually broad discretion in promulgating and implementing their own internal procedures in calling for and conducting *en banc* review. Where, as here, a litigant has filed a timely "suggestion" seeking *en banc* review, the manner of its treatment and disposition is largely within the court's well-nigh untrammeled discretion.

Here, as the *en banc* court candidly conceded, the Ninth Circuit's administrative procedures for conducting *en banc* polls among its nonrecused, active judges seriously

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[10] By circuit rule, as authorized by Congress, the Ninth Circuit has adopted a limited *en banc* procedure. The chief judge and ten active judges chosen by lot sit on each *en banc* panel; however, *en banc* rehearing is granted only on the vote of a majority of all (twenty eight) nonrecused, active judges of the court. 9th Cir. Rule 35-3. *See* Thomas E. Baker, *Rationing Justice On Appeal: The Problems Of The U.S. Courts Of Appeals* 80-81 (1994); Arthur D. Hellman, *Restructuring Justice* 63 (1990).

malfunctioned — through no fault of the litigants. *Thompson III*, 120 F.3d at 1049. Accordingly, no *en banc* poll was taken when it ordinarily would have occurred (and despite the request of two active judges). A *sua sponte* request to recall the mandate was made shortly after this Court denied certiorari in June 1997 and the full court at that time decided to postpone any further action until Thompson concluded state habeas proceedings and filed a further request for federal review. *Id.* at 1049. It was thus not until the filing of his emergency recall motion on July 22, 1997 that the full court took up his *en banc* request and recall motion. *Id.* at 1048-49.[11]

Clearly, in the absence of some jurisdictional defect, the decision of a majority of the nonrecused, active judges of the court to *sua sponte* correct its own administrative mistakes in the conduct of *en banc* review is largely unreviewable. *See, e.g., Western Pacific*, 345 U.S. at 269-70 (Jackson, J., dissenting [on other grounds]). Indeed, the decision by the majority of the full court to exercise its discretion in favor of granting further review may hardly be characterized as arbitrary, abusive or clearly erroneous — least of all when the merits of Thompson's underlying claims are subsequently found to be meritorious by a majority of the *en banc* court.

[11] It should be underscored that while Thompson's recall motion (and merits review) was heard by a mini-*en banc* court of eleven circuit judges, the decision to grant *en banc* status to the application was made by a majority of the full complement of nonrecused, active judges presently sitting on the court. Presumably, the earlier decision to postpone a vote on whether to grant *en banc* review was also made by a majority of the full court.

C. The Ninth Circuit's Infrequent Resort To *En Banc* Review Further Evidences The Court's Careful Consideration Of The Appropriate Use Of Limited Judicial Resources

Over the last twenty years, appellate caseloads have mounted continuously while, not surprisingly, the judicial resources available to meet them have not expanded correspondingly. Nowhere has there been greater exponential expansion of cases than in the Ninth Circuit, the largest and most geographically disparate federal court system in the nation. *See, e.g.*, Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U.Chi. L. Rev. 541 (1989); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 Ariz. St. L.J. 915 (1991); Arthur D. Hellman, *Dividing The Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261 (1996).

Nonetheless, *en banc* decisions, in the Ninth Circuit as elsewhere, constitute a tiny minority of precedential decisions. *See* Appendix Table, *infra*, detailing the statistics on *en banc* review for each circuit from 1980 through 1996. The federal courts nationwide have averaged fewer than 100 *en banc* decisions annually. The figures for the Ninth Circuit have averaged ten or fewer *en banc* dispositions each year. Indeed, in a court system that disposed of approximately 4500 appeals per year for 1992 through 1996, the Ninth Circuit's annual percentage of *en banc* dispositions has remained relatively constant at a minuscule rate of 0.28% for almost twenty years. *See* Ginsburg & Falk, 59 Geo. Wash. L. Rev. at 1049-50 & Table 7; Hellman, 57 Mont. L. Rev. at 281-82; Richard

A. Posner, *The Federal Courts: Challenge and Reform* 133-34 (rev. ed. 1996).[12]

Under the circumstances, it cannot seriously be contended, as the State suggests, that the Court of Appeals for the Ninth Circuit regularly abuses its discretion by engaging in the too promiscuous grant of *en banc* review. Indeed, the figures simply belie that contention. Given that *en banc* review, while a creature of statute and rule, is nevertheless left almost entirely to the discretion of the nonrecused, active judges of the full court, one would be hard pressed, on this evidence, to conceive of a situation in which the full appellate court's decision to grant *en banc* review would ever be an abuse of discretion. *See* Ginsburg & Falk, 59 Geo. Wash. L. Rev. at 1038. Certainly, its decision to accord this case belated *en banc* review, in light of the ultimately meritorious nature of Thompson's constitutional claims, was a manifestly sound one.

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[12] The figures and percentages listed in the Appendix Table are derived from the Annual Reports of the Director of the Administrative Office of United States Courts for federal fiscal years 1980-1996 (Table S-1). Compilations derived from the AO Reports for 1980-1992 may be found at 67 N.C. L. Rev. at 45 (Table 1) and 54 U. Pitt. L. Rev. at 816 (Table I). Data for 1992-1996 is derived directly from Table S-1 of each year's AO Report.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Appendix

En Banc Decisions by Circuit: 1980-1996*

Circuit	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96
DC	5	5	5	10	3	5	2	4	13	12	1	7	4	2	1	6	4
1st	0	0	0	0	2	0	1	1	1	5	4	5	3	6	0	0	3
2nd	4	2	1	1	0	1	1	1	2	1	1	0	2	2	0	1	1
3rd	5	14	5	5	3	5	5	8	4	4	2	2	7	5	9	9	11
4th	7	8	8	6	6	18	6	13	19	11	13	9	10	5	10	20	19
5th	24	21	12	11	19	13	18	10	17	5	10	8	16	6	5	18	15
6th	4	0	4	3	9	7	5	7	6	7	4	6	7	10	5	6	6
7th	5	2	7	8	6	3	7	8	7	10	7	15	2	6	48	4	5
8th	6	7	7	5	15	15	9	11	12	14	7	15	9	10	6	9	7
9th	3	5	9	4	14	6	5	7	9	7	6	8	13	8	7	8	25
10th	2	5	2	3	16	4	12	8	13	17	19	10	7	7	4	4	4
11th		14	10	14	8	19	18	10	16	7	12	4	14	9	11	11	7
Totals	**65**	**69**	**74**	**66**	**106**	**85**	**90**	**88**	**117**	**98**	**85**	**89**	**94**	**78**	**106**	**96**	**107**

***Source**: Annual Reports of the Director of the Administrative Office of the United States Courts, federal fiscal years 1980 to 1996. Compilation for years 1980-1987: 67 N.C. L. Rev. 29, 45 (1988) (Table 1); compilation for years 1982-1991: 54 U. Pitt. L. Rev. 805, 816 (1993) (Table I); data for years 1992-1996: Table S-1 of each years annual AO Report.